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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HISPANIC COALITION ON REAPPORTIONMENT, *et al.*,

Appellants,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the federal district court below err when it dismissed Appellants' claims by drawing inferences contrary to law and uncontested evidence that Hispanics' voting strength was intentionally diluted to deny them a state assembly district in which they constituted a majority of the population?

2. Was legislative privilege impermissibly applied to effectively bar evidence necessary for a judicial determination in a voting rights action?

3. Were protective orders erroneously granted on the basis of legislative privilege to preclude Appellants from gaining information to establish a discriminatory purpose in the creation and adoption of a reapportionment plan?

4. Is a state representative's good faith representation that he acted in a legislative capacity sufficient to cloak him with immunity when there is evidence to the contrary?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below in the United States District Court for the Eastern District of Pennsylvania were the Hispanic Coalition on Reapportionment; Alfred Delgado, Nitza Santiago, Nayda Cintron, Julio Olmedo and persons similarly situated who are registered voters in the City of Philadelphia, plaintiffs below; and the Legislative Reapportionment Commission; the Democratic Party City Committee of Philadelphia, its chairman David Glancey and State Representative Robert O'Donnell in their official capacities; William R. Davis, the secretary of the Commonwealth of Pennsylvania, his successor—if any—and agents, assignees, and employees, defendants below. They are the same parties herein, the plaintiffs as Appellants, the defendants as Appellees.

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JURISDICTIONAL STATEMENT

Appellants Hispanic Coalition on Reapportionment; Alfred Delgado, Nitza Santiago, Nayda Cintron, and Julio Olmedo, individually and on behalf of all others similarly situated appeal from the order of the three-judge panel of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982 dismissing claims against all defendants that a statewide reapportionment plan for the State Assembly was enacted in pertinent part with the discriminatory purpose of diluting Hispanic voting strength in the City of Philadelphia. Appellants also appeal from protective orders entered during trial on March 16, 1982, and in rulings on motions on March 4, 1982.

OPINIONS AND RULINGS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982, is unreported. It is reprinted at page 3 of the Appendix to this Jurisdictional Statement. Rulings on Motions for Protective Orders of the single district judge of March 4, 1982, and adopted by the three-judge panel on March 16, 1982, also are unreported. They are reprinted at page 19 of the aforementioned Appendix, and in the Trial Transcript at page 107.

JURISDICTION

This is an appeal from a dismissal of a voting rights challenge to a statewide reapportionment of the Pennsylvania General Assembly. Preliminary and permanent injunctive relief was denied.

Appellants claim that the reapportionment plan in pertinent part was intended and effected to diffuse the voting strength of Hispanics in Philadelphia, in violation of the Fourteenth and Fifteenth Amendments to the Constitution; Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973; and the Civil Rights Act of 1866, 42 U.S.C. § 1983.

Federal subject matter jurisdiction was invoked by Appellants pursuant to 28 U.S.C. § 1343 (3) and (4); and 28 U.S.C. §§ 2201 and 2202 for declaratory relief. A three-judge district court was convened in this matter, pursuant to 28 U.S.C. § 2284(a) on February 16, 1982. On April 6, 1982, the three-judge court entered a memorandum opinion and order dismissing Appellants' claims on grounds that they failed to show entitlement to relief against the Commonwealth of Pennsylvania and its Legislative Reapportionment Commission, and improperly joined other parties. A notice of appeal to the United States Supreme Court was filed on May 12, 1982, in the United States District Court for the Eastern District of Pennsylvania (Appendix [hereafter A]-54).

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1253. This action meets all the requirements of § 1253 since it is a challenge to the constitutionality of a

reapportionment of a statewide legislative body required to be heard by three judges[1] and temporary and permanent injunctive relief has been sought throughout these proceedings *Carter v. Stanton*, 405 U.S. 669 (1972). Under these circumstances, this Court has appellate jurisdiction.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1 provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Amendment XV, provides that:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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1 See Senate Report No. 94-204, 94th Cong., 2nd Sess. (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 1988.

2 On May 5, 1982, Appellants filed a Notice of Appeal to the U.S. Court of Appeals for the Third Circuit (A-57) in the United States District Court for the Eastern District of Pennsylvania for the sole purpose of preserving the right to an appeal in the event that this Court deems it lacks jurisdiction. See *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

42 United States Code Section 1973 provides that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.[3]

42 United States Code Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

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3 This provision recently was reenacted and became effective June 29, 1982, in the following form:

> Section 2. (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subsection (b).
>
> Section 2. (b) A violation of subsection (a) is established if based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered. ____ Stat. ____ (1982), Pub.L. 97-209, June 29, 1982.

STATEMENT OF THE CASE

The issues raised by this appeal focus on the requirements that must be met by persons and groups, such as Appellants, to establish discriminatory purpose and effect in the creation and adoption of an allegedly unconstitutional reapportionment plan, and the impediments that can be placed in their way to prevent the gathering and offering of evidence necessary to meet the standards of proof required by this Court. In question are a reapportionment plan for the Pennsylvania General Assembly (hereafter Assembly) and its effect on a fairly sizeable Hispanic community in Philadelphia.

Reapportionment of the Assembly in the Commonwealth of Pennsylvania (hereafter Commonwealth) is a task specifically delegated to a Legislative Reapportionment Commission. The Commission is statutorily created for the sole purpose of promulgating preliminary and final plans for the reapportionment of the election districts for the Assembly and the State Senate and conforming them to constitutional requisites (A-4).

The final plan becomes law unless exceptions to it are taken. If the plan is challenged, it becomes law only after approval by the Supreme Court of the Commonwealth (A-5).

In this case, the Legislative Reapportionment Commission (hereafter Commission) was constituted by February, 1981, to create and adopt such a plan for the 1980s. Its membership consisted of two Commonwealth Senators, Robert C. Jubelirer and Edward Zemprelli; two Commonwealth Representatives, Samuel E. Hayes and James J. Manderino; and a chairperson selected by them. The chairperson was James O. Freedman.

The Commission filed its preliminary plan (A-7) on August 20, 1981, and its final plan (A-8) on October 13, 1981. Despite numerous exceptions, the final plan was approved in a 4-3 decision by the Supreme Court of Pennsylvania on December 29, 1981. That Court subsequently denied numerous petitions for rehearing.

The reapportionment plan created 203 seats for the General Assembly. Given the total population for the Commonwealth, the ideal district would have consisted of 58,456 people (A-5). Hispanics in Philadelphia number approximately 63,000; most

of them live in a compact and contiguous section in North Central Philadelphia (A-5).

After the Supreme Court rendered its initial decision and stated that no evidence was provided to show any intent to discriminate in the creation and adoption of the reapportionment plan, Hispanics[4] learned that a television interview had been videotaped that might provide information to the contrary. Acting as a group and as individual registered voters, certain Hispanics, Appellants herein, obtained a transcript of that interview. That transcript was admitted into evidence in its entirety (A-148 *et seq.*).

The interview, of Philadelphia Democratic City Committee Chairman David Glancey, and other related information demonstrated that Hispanics were singled out as a group for disparate treatment in the reapportionment process (A-6).

Glancey devised a strategy for the City Committee (hereafter Committee) for a reapportionment plan for Philadephia (A-6). He transmitted information in accordance with that strategy to State Representative Robert O'Donnell (A-6). O'Donnell stated at trial that he was working on behalf of Commission member James Manderino to ascertain the views of the people of Philadelphia (A-6). A Philadelphia newspaper article referred to at trial stated: "The House plan was written by State representative O'Donnell, a Germantown Democrat, under the guidance of City Democratic Chairman David B. Glancey, (A-122)." (See A-10.)

The Glancey strategy in pertinent part was to cause the creation of a preliminary plan that would deliberately diffuse the Hispanic community of Philadelphia, to leave little opportunity for the election of an Hispanic representative (A-6). The strategy was intended by Glancey to force a strong reaction from Hispanics so that major readjustments would have to be made for the final reapportionment plan. These adjustments would have allowed the Philadelphia Democrats to be in a

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4 Puerto Ricans comprise almost the entire Hispanic community in Philadelphia. In the proceedings, Puerto Ricans and Hispanics were used interchangeably to refer to the affected group. Herein "Hispanic" will be the term used to refer to the affected community and "Hispanics" to the affected individuals.

stronger negotiating position with the Republicans (A-6). Neither Glancey nor anyone else associated with the political process ever expressed an intention to create a final plan for Philadelphia that would include an Assembly district with Hispanics in the majority, even if that were possible.

The preliminary plan put forth by the Commission was similar in all material respects to the Glancey strategy. That plan failed to provide for any Assembly district in which Hispanics constituted more than 15% of the population (A-7). At a public hearing, Hispanics testified and urged the Commission to create an Assembly district in which Hispanics would have an opportunity to maximize their voting strength (A-7). The AFL-CIO submitted a proposed plan that would provide a Philadelphia Assembly district in which Hispanics would comprise more than a majority of the population.

The final plan later adopted by the Commission and approved by the Pennsylvania Supreme Court provided for no Assembly district in which Hispanics constituted a majority. Testimony at trial revealed that both the Commission and O'Donnell knew such an Assembly district could be created in North Central Philadelphia that met all other constitutional requirements. Further undisputed evidence was presented that Commission Chairperson Freedman saw no reason to create such an Assembly district.[5] The area in question in the final plan contained a population in which the Hispanic proportion was little more than 40 per cent. The remainder had been fenced out and diffused into other Assembly districts.

Having accumulated some evidence of discriminatory purpose in the creation of the reapportionment plan and realizing the discriminatory impact on Hispanics, Appellants timely filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the Commission, the Committee, Glancey and O'Donnell. On February 18, 1982, Appellants filed an amended complaint to include William R. Davis, as Secretary of the Commonwealth as a defendant.

The district court judge below convened a three-judge court (A-53); denied Appellants' request for a temporary restraining

5 The specifics of the testimony and the appropriate pages in the Appendix are provided *infra*, at 13.

order to prevent the reapportionment plan from being implemented (A-51); and made a critical ruling effectively barring Appellants from gathering and using information about the actions of the Commission and its relationship to the Committee or the Glancey strategy (A-19 *et seq.*).

That ruling came in response to motions for protective orders from the Commission and O'Donnell to bar the taking of depositions of O'Donnell himself and Commission Chairperson Freedman. The district court judge granted the Commission's motion based on the legislative privilege enjoyed by Freedman as a member of the Commission (A-44). O'Donnell's motion was granted in part and denied in part. The single judge ruled that O'Donnell also enjoyed the benefits of the privilege to the extent that he was acting in a legislative capacity, but not to the extent that he was engaged in political or private activity (A-44). After asking plaintiffs' counsel to explain why such orders should not be granted, the judge ruled with regard to O'Donnell that he relied on the good faith of counsel and the witness to determine the scope of the inquiry (A-43).

At trial, the three-judge court affirmed the rulings on the protective orders with respect to O'Donnell (A-107). O'Donnell then stated that in all relevant respects he had acted in his legislative capacity and in his judgment he could not be questioned about his role in the reapportionment process (A-109). Limited questioning of him was allowed thereafter.

Appellants called five witnesses, including O'Donnell and Glancey.[6] At the close of their case, defendants below moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. After the Commonwealth presented one witness,[7] the three-judge panel ruled that it would decide the motions as if no evidence were presented by the defendants (A-13).

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6 Commission Chairman Freedman was not called, because all inquiry of him had been denied during discovery.

7 The Commonwealth presented a witness who described the process and costs for implementation of the reapportionment plan.

In an opinion and order of April 6, 1982, from which this appeal is taken, the court below dismissed all claims against the Commission and the Secretary of the Commonwealth because of Appellants' failure to show entitlement to relief. The Court also dismissed the Committee, Glancey and O'Donnell on grounds that they were improperly joined as parties (A-1). Appellants do not dispute the court's conclusion that the Committee, Glancey and O'Donnell were improperly joined as parties.[8] Instead Appellants raise novel and substantial questions about evidence needed to show discriminatory purpose and effect in the creation and adoption of a statewide reapportionment plan and what evidence may be obtained and used when parties involved in creation and adoption of such a scheme assert legislative privilege.

THE QUESTIONS PRESENTED ARE NOVEL AND SUBSTANTIAL

This voting rights action taken by Hispanics requires delineation of the proof needed to establish discriminatory purpose and effect in the creation and adoption of a reapportionment plan not covered by Section 5 of the Voting Rights Act of 1965, as amended.

Such plans invariably are drawn by legislators and their agents who may, as here, assert legislative privilege in an attempt to bar the tracing of discriminatory purpose back to the initial conception of such a scheme.

Appellants contend that the single judge below erred in denying discovery of Commission members, and in granting a protective order to a state legislator, who then was free to avoid answering all questions about how he acted as a go-between for a Commission member and a political party with an influential role in drawing lines for a reapportionment plan.

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8 Neither would Appellants contest here that the Commission is immune from suit—a defense raised on which the court below stated it was unnecessary to rule (A-11, n. 4). See *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980).

The three-judge court likewise erred in similarly limiting questions to that state legislator at trial.

The link between political powers and the reapportionment agents acting for a legislative body is critical in tracing a plan said to be discriminatory on its face, and as applied to a particular racial or ethnic group. That link here was broken by the invocation of legislative privilege.

The court below then made erroneous inferences that the Commission acted appropriately, regardless of the diffusion of Hispanics in an Assembly district in Philadelphia in its preliminary plan, despite its failure to provide a district in which Hispanics constituted a majority of the population after being shown that one could be established. In a case arising under Section 2 of the Voting Rights Act, this Court has not set forth a standard for judgment of what constitutes dilution of an affected minority's voting strength. The court below incorrectly assumed that the Commission had no duty to determine the factors that constitute such dilution.

I. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' CLAIMS BY DRAWING INFERENCES CONTRARY TO LAW AND UNCONTESTED EVIDENCE THAT HISPANICS' VOTING STRENGTH WAS INTENTIONALLY DILUTED TO DENY THEM A STATE ASSEMBLY DISTRICT IN WHICH THEY CONSTITUTED THE MAJORITY OF THE POPULATION.

Hispanics could have constituted a majority of the population in a Pennsylvania State Assembly district, in the city of Philadelphia, for the first time in the history of the Commonwealth. Past discrimination could not be shown, because they only recently had concentrated in significant numbers. But the totality of circumstances including adoption of a reapportionment plan seemingly conceived to dilute their voting strength provides basis for a claim on which relief can be based. *Lodge v. Buxton,* 639 F.2d 1358 (5th Cir. 1981) *aff'd sub. nom. Rogers v. Lodge,* S.Ct. 80-2100, __ U.S. __ (July 1, 1982).

Here a political party devised a strategy to diffuse the Hispanic population in the creation of a preliminary plan for the Commonwealth Assembly without provision for the adoption of a final plan to encompass an Assembly district in which Hispanics constituted a majority of the population. Party and Commission members knew such a district could be created in accordance with constitutional requirements. Why the Commission did not adopt such a plan admittedly is not known, but

> [t]he discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy.

Lodge v. Buxton, supra, at 1381.

It was uncontested at the trial below that during public hearings for consideration of modification of a preliminary plan (hereafter Preliminary Plan) (A-164), the AFL-CIO submitted a proposal for legislative reapportionment of Assembly seats in the City of Philadelphia (hereafter AFL-CIO Plan) (A-163). Unlike the Democrats who did not suggest a district in Philadelphia with a Hispanic population greater than 15%, the AFL-CIO Plan contained one, the 180th Assembly District, with at least 54 per cent Hispanic population.

The Commission then adopted a final plan in which the 180th Assembly District included little more than 40 per cent Hispanic population; the majority of the population is white (hereafter Final Plan) (A-165). No other district had a population encompassing a greater percentage of Hispanics. On the face of the Final Plan, Hispanics had been fenced out of the one Assembly district in which they could have constituted a majority of the population.

Philadelphia City Committee Chairperson David Glancey, an attorney, testified that the Commission took into account his data for "various ethnic populations, district by district, in the city" of Philadelphia (A-98). The court below found that some of these suggestions were incorporated in the Preliminary Plan (A-7).

Those population numbers were submitted by Glancey through O'Donnell (A-112). That legislator claimed he was acting for both the political party and for a Commission

member at the time he received those suggestions (A-113), but that in his judgment he always acted in a legislative capacity (A-109).

The meaning of those population numbers, their application to Hispanics, and their acceptance by the Commission were explained in a remarkable television interview of Glancey. In that television interview admitted into evidence in its entirety (A-87), Glancey stated:

a. The Democratic City Committee was very influential in the process of formulation of the Preliminary Plan (A-154);

b. The Committee did consult with the Commission during the formulation of the Preliminary Plan, through O'Donnell (A-155);

c. The Committee's strategy diffused the (Hispanic) population (A-156);

d. The Committee left out the Hispanic community on purpose in the Preliminary Plan (A-157);

e. The Final Plan included a population consisting of 40.1 per cent Hispanic, six per cent black, and the remainder white in the 180th Assembly District (A-154, 158);

f. The Committee knew the Preliminary Plan would not meet constitutional requirements; Glancey himself saw no reason to provide a district with an Hispanic population greater than 40 per cent (A-157, 158).

The Court below failed to draw any material findings of fact from the transcript or from two of the witnesses. One of these witnesses, a state legislator, who like Glancey and O'Donnell is an attorney, testified for Appellants that Commission member James Mandarino said that the Commission would try to follow the Democratic City Committee's plan (A-81). (Mandarino was the Commission member for whom O'Donnell said he acted.) The witness testified the Commission made only two modifications before presenting the Final Plan, one of them affecting the Hispanic population in the 180th (A81-82), after it promulgated the Preliminary Plan.

Uncontested evidence from the other witness, also an attorney, revealed that, between submissions intended for the Preliminary and Final Plans, Commission Chairman Freedman said he saw no need to form a district with an Hispanic majority (A-67). Freedman was reported to have said the Final Plan would reflect the judgment that no Assembly district for Philadelphia would encompass an Hispanic majority (A-67).

The Commission surely could have considered an Assembly district that would "fairly reflect the strength" of a minority community. *City of Richmond v. United States*, 422 U.S. 358, 370-71 (1975). The only testimony submitted on this issue was that the Commission chairman saw no need to take into account that Hispanics could constitute a majority of a district.

A plurality of this Court has suggested what a state should take into account and regard as a majority in its reapportionment considerations pursuant to Section 5 of the Voting Rights Act of 1965. Speaking through Justice White in *United Jewish Organizations v. Carey*, 430 U.S. 144, 162, (1977), the plurality stated:

> [N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.
>
> Moreover, in the process of drawing black majority districts in order to comply with Section 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the Beer plan, for example, was 54% of registered voters.
>
> At a minimum and by definition, a 'black majority district' must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the

> election of a black representative and to obtain approval of its reapportionment plan.'

Id., at 163.

Once it is shown that a reapportionment plan ultimately is traceable to a discriminatory purpose, as it is here to the conception of dilution of Hispanic voting strength in the Democratic Party City Committee strategy and the unexplained action of the Commission in its Preliminary Plan mimicking the Committee's strategy and in its Final Plan,

> '[t]he burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures'

produced the undesired result. *Washington v. Davis,* 426 U.S. 229, 241 (1976).

In this case, the court below never determined if or when the burden should shift to the Commonwealth or the Commission to provide a valid reason for a Final Plan for the Assembly without a district in which Hispanics could have been in the majority, when such an alternative was available.

What must be shown, and by whom, when a minority group, such as Hispanics herein, claims that its voting strength was diluted as part of a plan "conceived or operated (as a) purposeful devic(e) to further racial . . . discrimination"? *Mobile v. Bolden,* 446 U.S. 55, 70 (1980) quoting from *Whitcomb v. Chavis,* 403 U.S. 124,149 (1971).

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9 In *United Jewish Organizations v. Carey, supra,* Justice White discussed the relationship between the number of registered voters in a district as compared to the general population. He noted that it might be necessary to assure a population higher than 50 per cent to gain the requisite minimum of registered voters. "The inquiry under Section 5 focuses ultimately on the 'position of racial minorities with respect to their effective exercise of the electoral franchise.' *Id.*, at 164. See also page 163, note 22, which explains that at least for Section 5 scrutiny by the Justice Department the requisite minority voting strength on the basis of population necessarily would have to be more than 50 per cent.

It is suggested here that a court examining a claim under Section 2 of the Voting Rights Act has a duty similar to that of the United States Department of Justice under Section 5 to consider whether minority voting strength has been diluted as alleged.

Without a finding that the unexplained rejection by a legislative body of an election district in which an ethnic group can constitute a majority of the population, that is, more than 50 per cent constitutes a "bottom line" for determining racial impact, a court has no guidance at present to decide whether there has been dilution of minority voting strength in violation of Section 2 and the United States Constitution. In a case like this in which no history exists to demonstrate discriminatory purpose, no method appears sufficient to show that a legislative body engaged in reapportionment "was either motivated by racial considerations or in fact drew the districts on racial lines." *Wright v. Rockefeller,* 376 U.S. 52,56 (1964).

That does not appear to be the intended result of decisions of this Court in cases in which it has been found that minorities must show such motivation. *Washington v. Davis, supra,* 426 U.S. at 239. Courts necessarily must examine various circumstances so that they can infer "from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," *Id.* at 242.

The court below here did not determine whether the Final Plan bore more heavily on Hispanics than any other protected or unprotected group. It simply inferred that the Final Plan was produced as a result of a normal political process, (A-16), rather than one poisoned at its conception and finalized in a form that fenced out Hispanics. The court below avoided ruling on what would constitute dilution of minority voting strength but instead inferred that Hispanics actually were seeking proportional representation (A-15,n.7).

Appellants were not and are not seeking proportional representation. They were and are asking for a judicial determination that Hispanic voting strength was diluted in the conception and adoption of a reapportionment plan for the Pennsylvania Assembly:

> The district judge must be mindful of the impact of proposed plans on different racial groups. His duty to avoid both gerrymanders and racial dilution requires that much. The judge must analyze the plan and determine that the probable results are such that minority strength is not diluted. But this legitimate concern with the outcome cannot justify a strict proportionality brought about by manipulation of district lines. If the plan passes the dilution test [citations omitted], race is no longer an important factor.

Marshall v. Edwards, 582 F.2d 927,936 (5th Cir. 1978), *cert. den.* 442 U.S. 909 (1979).

The Final Plan here never was subjected to a dilution test. Instead, the court below ruled that since an Assembly district was provided in which the Hispanic population was increased from 15 per cent to 40 per cent, "[i]t is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey. That the Commission failed to provide for a district containing the maximum possible concentration of Hispanic voters does not weaken the argument that the Commission acted properly (A-16)."

While the court below was ruling as if the defendants had presented no evidence, it simply discounted the Appellants' offer of proof by inference. In so doing, the court ignored the kind of examination of the evidence it was required to provide at that stage of the proceedings in accordance with *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

Surely the court below erred when it failed to apply any relevant test for the examination of evidence in a civil rights or voting rights case but instead determined that

> "[r]eapportionment brings into play a variety of competing considerations—ethnic, racial, political, economic and otherwise. Compromise is of the essence of the process. Plaintiffs here have not shown that such competing con-

> siderations did not exist . . . . In the absence of such a showing, the Court cannot conclude that the Commission's failure to create a 56% Hispanic district resulted from purposeful discrimination rather than from necessary accommodation (A-16)."

This Court therefore should assume jurisdiction and reverse that determination with instruction to apply the appropriate standard for judicial review of voting rights claims.

II. LEGISLATIVE PRIVILEGE CANNOT BE APPLIED AS IT WAS HERE TO BAR EVIDENCE NECESSARY FOR A JUDICIAL DETERMINATION IN A VOTING RIGHTS ACTION.

The requisite burden of proof placed upon litigants who seek to prove violations of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act is beyond dispute. Proof that the legislature is "motivated by racial considerations," *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964), and that the electoral system at issue is "conceived or operated as a purposeful device to further racial discrimination," *Mobile v. Bolden*, 446 U.S. 55,66 (1980) is needed to establish a constitutional violation.

But heretofore insurmountable barriers have not been placed in the way of gathering and presenting the evidence necessary to establish illicit purpose on the basis of all the circumstances surrounding a voting rights action. What is needed is the opportunity for litigants like Appellants to present facts that will permit "a sensitive inquiry [by the trial court] into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Tolerance must be shown in voting rights cases to proof other than by direct evidence. *Rogers v. Lodge, supra; Mobile v. Bolden, supra.*

Circumstantial evidence of the foreseeability of the discrimination may not be sufficient to establish discriminatory purpose but such proof nevertheless is relevant, *Columbus*

Board of Education v. Penick, 443 U.S. 449 (1979), if it shows that a result complained of occurs because of, rather than in spite of, the invidious intent. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). Knowledge of the alleged discriminatory harm, *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) *cert. den.* 445 U.S. 935 (1980), and a choice of a discriminatory option when less discriminatory alternatives are available, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400 (7th Cir. 1978), *cert. denied*, 439 U.S. 824 (1978), likewise should be taken into account for a judicial determination of claims of dilution of minority voting in a case such as the one at the bar.

Not only did the court below ignore such circumstantial evidence here, but it barred Appellants from gathering and presenting germane facts at trial by issuing and enforcing protective orders granting broad use of legislative privilege. (See, e.g., A-122,124).

The use of legislative privilege as a bar to such inquiry has never been specifically addressed by this Court. This Court, however, consistently has held that the privileges and immunities that state legislators and their agents enjoy in federal question cases are developments of federal common law and do not rest on the Speech or Debate Clause in Article I, Section 6 of the United States Constitution, *United States v. Gillock*, 445 U.S. 360 (1980); *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979).

The *Gillock* opinion represents this Court's sole full deliberation of an attempt by a state legislator to assert an evidentiary privilege based on his legislative immunity in a federal question case. The case involved the criminal prosecution of a state legislator under federal bribery statutes. Petitioner therein argued that this Court should exclude all evidence concerning his legislative acts pursuant to: Rule 501 of the Federal Rules of Evidence; the history and policy behind the federal Speech or Debate Clause; and principles of comity.

This Court, in an opinion by the Chief Justice, rejected all of these arguments. Stating that Rule 501 specifically permits the development of evidentiary privileges on a case-by-case

basis, this Court noted that the privilege sought was not one of the proposed privileges submitted to Congress by the Advisory Committee of the Judicial Conference. Such an omission, the Chief Justice stated, suggested that "the claimed privilege was not thought to be indelibly ensconced in our common law or an imperative of federalism." *Gillock, supra*, at 367-368 (footnote omitted).

The Chief Justice then dismissed the other contentions. Interpreting case law concerning legislative privilege in light of the "American experience," *id.*, at 369, this Court held that neither the separation of powers justification which supported the Speech or Debate Clause's formulation nor principles of comity provides for an extension of evidentiary privilege to a state legislator in all circumstances.

> . . . (F)ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch. Baker v. Carr, 369 U.S. 186, 210, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). Cf. Dombrowski v. Pfister, 380 U.S. 479, 489, 492, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) (federal court may enjoin state court application of a clearly unconstitutional statute).

Id., at 370 (footnote omitted).

Regarding the second rationale for the Speech or Debate Clause—the need to preserve legislative independence—the *Gillock* opinion stated that *Tenney v. Brandhove*, 341 U.S. 367 (1951) does not mandate an *evidentiary privilege* for state legislators, at least in a criminal case. Although *Tenney* held that the Civil Rights Act of 1866 did not abrogate the *common law immunity* from a suit for damages that state legislators enjoy, the Chief Justice also relied upon two cases in which this Court accepted the legality of federal interference in state legislative processes, *Bond v. Floyd*, 385 U.S. 116(1966), and *Baker v. Carr*, 369 U.S. 186 (1962).

In light of *Gillock, supra*, the application of the American structure of federalism to the case at the bar is a novel and substantial issue raised by this appeal in a civil action, since

Appellants effectively were precluded by the granting of protective orders from gathering information about the various plans the Commission and its agents actually considered.

III. THE COURT BELOW ERRED IN GRANTING PROTECTIVE ORDERS, BASED ON LEGISLATIVE PRIVILEGE, WHICH PRECLUDED APPELLANTS FROM GAINING INFORMATION TO ESTABLISH DISCRIMINATORY PURPOSE IN THE CREATION AND ADOPTION OF A REAPPORTIONMENT PLAN.

The protective order granted to the chairman of the Commission by the court below placed Appellants in an unwarranted and anomalous position. On the one hand, Appellants were required to present evidence that the reapportionment plan in question was conceived with a discriminatory purpose. On the other, Appellants were barred by order of the single judge below, later affirmed by the three-judge panel, from inquiring because of legislative privilege about factors considered by Commission members in presenting a Preliminary Plan and promulgating a Final Plan that fenced out Hispanics in an Assembly district in Philadelphia. This Court has never ruled in a voting rights case, or any similar action requiring the showing of discriminatory purpose, the extent to which the body engaged in reapportionment can assert legislative privilege to bar inquiry into their actions. *Cf. Brown v. Califano,* 627 F.2d 1221, 1234, n. 78 (D.C. Cir. 1980); *In re Grand Jury Proceedings,* 563 F.2d 577,586-587 (3rd Cir. 1977, Gibbons, j., concurring).

This Court certainly has left a door open to examination before trial of legislators and their agents who are allegedly acting illegally. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977); see *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971). Whether a protective order below was appropriate under these cases is a substantial and novel issue which Appellants ask this Court to consider.

At the time the protective order was granted, Appellants already had offered proof that the Commission Preliminary Plan remarkably resembled in all pertinent respects the Democratic Party City Committee strategy to dilute the minority voting strength of Hispanics. Yet the single judge below ruled that Appellants had not shown that this case involved the extraordinary circumstances that would allow full scope of examination before trial of persons responsible for or involved in reapportionment.

The *Arlington Heights* decision, *supra,* provided important and often cited "subjects of proper inquiry" that Appellants might address to prove that a legislature acted with discriminatory purpose or intent, and thereby violated federal statutory and constitutional protections afforded racial and ethnic groups. One of those subjects was the legislative or administrative history behind the action. *Id.* at 268. Speaking for the *Arlington Heights* majority, Justice Powell noted:

> In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951); United States v. Nixon, 418 U.S. 683, 705, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974); 8 J. Wigmore, Evidence Section 2371 (McNaughton rev. ed. 1961).

Id.

Justice Powell then noted:

> This Court has recognized ever since Fletcher v. Peck, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1981), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971).

Id., at 268, n.18.

The *Arlington Heights* plaintiffs failed to prove that discriminatory purpose was a motivating factor in the Village Board's decision, but this Court noted that they were allowed to depose and examine a Board member at trial:

> Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper [to limit other examination at trial].

Id., at 270, n. 20.

As noted, the single judge below here failed to find extraordinary circumstances to warrant inquiry into any matter cloaked by immunity or privilege (A-27,38). That ruling would appear contrary to the *Arlington Heights* decision that:

> When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to refrain from reviewing legislative acts] is no longer justified.

Id., at 265-266.

In this case, Appellants already had presented a transcript of the Glancey interview showing that the Democratic Party City Committee decision to deliberately diffuse the Hispanic population in North Central Philadelphia had been transmitted to O'Donnell, one of the individuals claiming legislative privilege because he was working for Commission member James Mandarino. See also, *McMillan v. Escambia County, Fla.*, 638 F.2d 1239,1246, n. 15 (5th Cir. 1981), *cert. dismissed*, U.S., 102 S.Ct. 17 (1981) (circumstances found for inquiry into legislative intent and actions in a voting rights case).

The *Arlington Heights* decision also provides further bases here for Appellants' inquiry at least into the materials that were available to the Commission and its agents to formulate reapportionment plans. *Arlington Heights, supra*, at 270, n. 20. Those materials would have given Appellants an opportu-

nity to gather at least circumstancial evidence in support of their positon that the Preliminary and Final Plans were drawn with racial motivation or along racial lines to fence out Hispanics.

Here such inquiry was foreclosed by the granting of the protective orders. Appellants therefore urge this Court to address the circumstances in which the use of legislative privilege may be limited to permit the obtaining and use of evidence to establish discriminatory purpose in a voting rights case.

IV. A STATE LEGISLATOR IS REQUIRED TO MAKE MORE THAN A GOOD FAITH REPRESENTATION TO CLOAK HIMSELF WITH IMMUNITY IF HE IS TO AVOID DISCLOSURE IN DEPOSITION OR TESTIMONY OF HIS ROLE IN A REAPPORTIONMENT PROCESS ONCE PRIMA FACIE EVIDENCE ESTABLISHES THAT HE ACTED AT LEAST IN PART IN A POLITICAL RATHER THAN LEGISLATIVE CAPACITY.

Both the single judge and the three-judge court were made aware by a television interview transcript provided with the complaint in this action that State Legislator Robert O'Donnell acted in a political capacity during deliberations of a reapportionment plan for the Pennsylvania Assembly (A-9). Yet from the outset, Appellants bore the burden of showing why a protective order should not be granted to cloak O'Donnell with immunity (A-32). The court then ruled that O'Donnell could be questioned "to the extent to which the deposition in good faith would inquire only into . . . (O'Donnell's) activities and functions as a private person, or that are strictly political . . . . " (A-43).

The deposition went aground, however, as did the taking of testimony at trial, because, in O'Donnell's judgment, he was never consulted outside of his legislative capacity about a reapportionment plan (A-109). That assertion was directly contradicted by Democratic City Committee Chairperson David Glancey at trial and in the television interview. Glancey

said he asked O'Donnell to help him with the reapportionment process (A-91) and they worked together with three or four others to put forth a legislative reapportionment plan for Philadelphia (A-155). Glancey provided information to O'Donnell so that "the Commission would know the feelings of the people in Philadelphia, some people in Philadelphia," (A-112); Glancey said O'Donnell was working in both his political and legislative capacities but could not say when O'Donnell was in which role (A-113).

For the first time at trial, O'Donnell revealed that he talked to Glancey (A-119), and to Hispanic attorney Angel Ortiz about a "Spanish district." O'Donnell did not let Ortiz know that he was acting for the Commission at the time (A-120).

At trial Appellants' counsel and the court during O'Donnell's testimony tried to sort out when the state legislator acted in which capacity with mixed success. For example, O'Donnell was allowed to deny a daily newspaper article's characterization of him as the writer of the Commission's reapportionment plan, but he was protected by an objection sustained on the basis of immunity from answering what, if any plans he did draw. (A-122-124).

Such assertions, as that by O'Donnell that he always acted in his legislative capacity during reapportionment considerations, are insufficient to warrant the blocking of deposition and discovery of documents for all relevant information, and a subsequent invocation at trial, at will by that state legislator of an evidentiary privilege of immunity. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). Besides, O'Donnell at most was in an "official" not legislative capacity. See *Gravel v. United States*, 408 U.S. 604 (1972).

Although the assertion of state legislative privilege is grounded in federal rather than state law, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. *supra* at 404, weight should be given by this Court to recent interpretation by the Pennsylvania Supreme Court of the privilege's application *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977).

The Pennsylvania Supreme Court noted that the Commonwealth's Constitution contains a Speech or Debate Clause that

essentially is the same as that in Article I, Section 6 of the United States Constitution. See also *Consumers Education and Protective Assn. v. Nolan,* 368 A.2d 675 (Pa. 1977).

The *Sweeney* court then interpreted federal cases to determine whether an expelled state legislator could be barred from seeking back pay by an assertion of legislative immunity against him. The court then ruled such assertion of immunity did not bar all judicial review of legislative acts. *Sweeney v. Tucker, supra,* at 704.

In pertinent part, the Pennsylvania Supreme Court ruled:

> Even where an action against a legislator is barred by the Speech or Debate Clause, legislative employees who participate in unconstitutional activity are responsible for their actions; that the legislative employees are acting pursuant to express orders of the legislature does not bar judicial review of the underlying legislative decision.

Id.

A legislator or someone acting for him only would be protected from inquiry into conduct within the sphere of legitimate activity. *Sweeney v. Tucker, supra,* at 704, n. 16. (Cited are *Gravel v. United States,* 408 U.S. 606, 624 (1972) and *Tenney v. Brandhove,* 341 U.S. 367, 375 (1951).)

At the time the single judge below here determined that a protective order should be granted in part for O'Donnell, the court first should have ascertained and ruled on the parameters for discovery in light of the evidence before it. That court erred by limiting discovery to a "good faith" inquiry of a state legislator who, in his own judgment, always acted in a legitimate legislative function during reapportionment consideration, despite evidence to the contrary. It was for the court from the outset, not the legislator, to set the boundaries of the inquiry and the scope of discovery.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the Court note probable jurisdiction; and reverse and remand this action with direction to the trial court, or set this case down for full hearing at the earliest possible date.

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Respectfully submitted,

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